United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

8-9 76-7295
77-7092

B

P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CARL A. BEAZER, et al.,

Plaintiffs-Appellees-
Cross-Appellants,

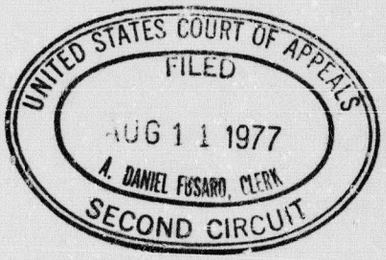
- against -

NEW YORK CITY TRANSIT AUTHORITY,
et al.,

Defendants-Appellants-
Cross-Appellees.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

PETITION OF DEFENDANTS FOR
REHEARING AND SUGGESTION FOR
REHEARING EN BANC AND APPENDIX



ALPHONSE E. D'AMBROSE
General Counsel
Attorney for Transit Authority
Defendants-Appellants-
Cross-Appellees

HELEN R. CASSIDY
JAMES P. McMAHON
JOAN OFFNER
of Counsel.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CARL A. BEAZER, et al.,

Plaintiffs-Appellees-
Cross-Appellants,

- against -

NEW YORK CITY TRANSIT AUTHORITY,
et al.,

Defendants-Appellants-
Cross-Appellees.

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION OF TRANSIT AUTHORITY DEFENDANTS FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC AND APPENDIX

To the Honorable Judges of the
United States Court of Appeals
for the Second Circuit:

The defendants present this petition for rehearing and suggestion for rehearing en banc of the decision of June 22, 1977 (attached hereto as "Appendix") in this action brought under 42 USC § 1983, enjoining as violative of the equal protection and due process clauses of the Fourteenth Amendment, the New York City Transit Authority's policy of not hiring participants in methadone maintenance programs; ordering class relief for the plaintiff class; ordering employment and back pay for five individual members of the plaintiff class; and awarding attorneys fees in the sum of $324,290 to the plaintiffs.

PRELIMINARY STATEMENT

This petition raises a crucial issue as to this Court's jurisdiction over the defendants in a proceeding brought under 42 USC § 1983. While this issue was not raised by the defendants on the appeal, "it is the duty of this court to see to it that [its] jurisdiction...is not exceeded." City of Kenosha v. Bruno, 412 U S 507, 511 (1973); Louisville Nashville R. Co. v. Mottley, 211 U S 149, 152 (1908).

POINT I

THE COURT LACKS JURISDICTION OVER THE NEW YORK CITY TRANSIT AUTHORITY UNDER 42 USC § 1983 BECAUSE THE TRANSIT AUTHORITY IS NOT A PERSON WITHIN THE MEANING OF THAT STATUTE.

42 USC § 1983 creates a cause of action for deprivation of rights against "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory" subjects a citizen or other person to the deprivation of any rights secured by the Constitution and laws of the United States. It is well settled that a municipality is not a "person" subject to suit under § 1983 for either monetary or equitable relief. Monroe v. Pape, 365 U S 167 (1961); City of Kenosha v. Bruno, 412 U S 507 (1973). This principle has been applied repeatedly to the States and other governmental bodies as well as municipalities. Rosado v. Wyman, 414 F. 2d 170, 178 (2d Cir. 1969) (opinion of HAY, J.) rev'd on other grounds, 397 U S 397 (1970); Bennett v. California, 406 F. 2d 36, 39 (9th Cir.) cert. denied, 394 U S 966 (1969); Glaney v. Parole Bd., 287 F. Supp. 34, 36 (W. D. Mich. 1968); Taylor v. Pennsylvania Bd. of Parole, 263 F. Supp. 450 (M. D. Pa. 1967); Zuckerman v. Appellate Div., 421 F. 2d 625 (2d Cir. 1970); Pinkus v. Arnebergh, 258 F. Supp. 996, 1003 (C. D. Cal. 1966); United States ex rel. Gittlemacker v. County of Philadelphia, 413 F. 2d 84, 86 (3d Cir. 1969) cert. denied, 396 U S 1046; United States ex rel. Lee v. Illinois, 343 F. 2d 120 (7th Cir. 1965); Nugent v. Sheppard, 318 F. Supp. 314, 315 (N. D. Ind. 1970); Burmeister v. New York City Police Dep't, 275 F. Supp. 690, 695 (S. D. N. Y. 1967).

Moreover, this Court recently dismissed a complaint brought under § 1983 against the New York State Division of Human Rights, stating that the Division is not a "person" suable under that statute. Grinan v. State of New York, Division of Human Rights, Docket No. 76-7568, June 3, 1977.

In Sams v. New York State Board of Parole, et al., 352 F. Supp. 296 (S. D. N. Y. 1972, appeal dismissed 2d Cir. 12/11/73), the court held that the New York City Transit Authority is not a "person" under § 1983:

> "It is well settled since Monroe v. Pape that a municipal corporation is not a 'person' within the purview of either section 1983 or section 1985. The logical extension of the doctrine makes it applicable to the State and governmental agencies, such as a state department of social services, state boards of parole, state courts, a city-owned hospital, city police departments, a city rent and rehabilitation administration, and school districts. This defendant City Transit Authority also has been held immune from suit under the Monroe v. Pape doctrine.
>
> "Since the City Transit Authority, state-created, is a public benefit corporation and performs a governmental function, the court holds that it is not a 'person' within the ambit of section 1983, and accordingly the claim against it for money damages under that section is dismissed for lack of subject matter jurisdiction."

Likewise, in Rudine v. New York City Transit Authority, Civil No. 70-1500 (E. D. N. Y., May 21, 1971) cited with approval in Sams, supra, the court held that the Transit Authority is not a "person" within § 1983, stating:

> "The Authority is a body corporate and politic constituting a public corporation (N.Y. Public Authorities Law § 1201[1]). As such, it is an arm or agency of the state, and is not a 'person' within the meaning of 42 USC § 1983. Therefore the

court lacks jurisdiction under 28 USC § 1343, and the action against the Authority must be dismissed."

See also Torres v. New York City Transit Authority, Civil No. 70-1397 (E. D. N. Y. April 8, 1971) in which an action brought against the Transit Authority under § 1983 was dismissed for lack of jurisdiction, the court stating that "the fixation of fares is not the act of a 'person' within the meaning of the Civil Rights Act." This decision was affirmed by this Court without opinion and certiorari was denied, 411 U S 919 (1971).

As indicated in Rudine, supra, the New York City Transit Authority was created by the Legislature as a "body corporate and politic constituting a public benefit corporation." (Public Authorities Law, § 1201.1.) The Public Authorities Law expressly declares that the Authority "shall be regarded as performing a governmental function in carrying out its corporate purpose and and in exercising the powers granted by this title." (P.A.L. § 1202.2) The Authority operates the transit facilities owned by the City of New York. (P.A.L. § 1203) It is composed of members appointed by the governor by and with the advice and consent of the senate. (P.A.L. § 1201.1, 1263) The Authority performs the functions previously vested in the Board of Transportation of the City of New York, a former city agency. (P.A.L. § 1202.1)

In Lerner v. Casey, 2 NY 2d 355 (1957) the New York Court of Appeals noted that the City of New York owns the rapid transit facilities which constitute the New York City Transit System, that those facilities are leased by the City to the Transit Authority, that under the lease, the City

is required to pay the costs of the capital improvements on the transit system, and that the City thus has a proprietary interest in those facilities. The Court concluded that "the operation of the rapid transit facilities is a basic governmental service indispensable to the conduct of all other governmental as well as private activities necessary for the public welfare."

In Forman v. Community Services, Inc., 500 F. 2d 1246 (2d Cir. 1974), revd. on other grounds, sub. nom. United Housing Foundation, Inc. v. Forman, 421 U S 837 (1975), this Court ruled that the New York State Housing Finance Agency could be sued under § 1983, relying on Escalera v. NYC Housing Authority, 425 F. 2d 853 (2d Cir. 1970), cert. den. 400 U S 853 (1971), Holmes v. NYC Housing Authority, 398 F. 2d 262 (2d Cir. 1968). However, in those cases, it does not appear that the Housing Authority raised the defense that it was not a "person" for § 1983 purposes and this Court did not consider it. In any event, Forman is clearly distinguishable from the case at bar. As the Court in Forman noted, the State Housing Finance Agency "acts only as a credit or financing entity." It is engaged in matters partaking more of the nature of ordinary business than functions of a governmental character. (Cf. 81 C.J.S. States § 216[4].) Thus, it is fundamentally different from the Transit Authority which, as noted by New York's highest court in Lerner v. Casey, supra, performs a basic and indispensable governmental service. The Transit Authority is clearly an integral and essential arm or agency of the state and, consequently, is not a "person" subject to suit under § 1983.

POINT II

THE COURT LACKS JURISDICTION OVER THE INDIVIDUALLY NAMED DEFENDANTS UNDER 42 USC § 1983 BECAUSE, AS AN EXTENSION OF THE TRANSIT AUTHORITY, THEY ARE NOT PERSONS WITHIN THE MEANING OF THAT STATUTE

Merely because the plaintiffs have made the Chairman and Members of the Board of the Transit Authority defendants in this action does not render them liable under § 1983. When a suit is lodged against public officials in their official capacities, with the intent and purpose of obtaining a judgment which will establish a liability on the state or an arm of the state, and will make the state respond in equity or damages, the suit is, in actuality, "one against the State even though the State is not named as a defendant." Westberry v. Fisher, 309 F. Supp. 12, 18 (D. C. Me., 1970). Cf. also Kennecott Copper Corp. v. State Tax Commission, 327 U.S.573 (1946); Ford Motor Co. v. Dep't of Treasury of Ind., 323 U S 459 (1945); Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944).

Under New York law, the individually named defendants herein are duly appointed public officials of an agency of the State of New York (Public Authorities Law, § 1201.2) and the entire thrust of this proceeding is obviously directed to that agency. In Bennett v. Gravelle, 323 F. Supp. 203, 211 (D. C. Maryland, 1971), aff'd 451 F. 2d 1011 (1971) cert. dis. 407 U S 917 (1972), in dismissing a complaint in a civil rights action brought individually and in their official capacities, against the Chairman and other members of the Washington

Sanitary Commission for alleged racial discrimination, the court said:

> "In their official capacities, the Commissioners are extensions of the municipal agency and are, therefore, not 'persons' within the meaning of section 1983. Accordingly, damages may not be assessed against the defendants under this section for acting in their official capacities."

Similar conclusions were reached in Worley v. California Department of Corrections, 432 F. 2d 769 (9th Cir., 1970) and Silver v. Dickson, 403 F. 2d 642 (9th Cir., 1968) cert. den. 394 U S 990 (1969) involving state parole board members.

POINT III

EVEN IF THE INDIVIDUALLY NAMED DEFENDANTS ARE PERSONS WITHIN THE MEANING OF § 1983, THEY ARE SUBJECT ONLY TO INJUNCTIVE OR DECLARATORY RELIEF, AND ARE IMMUNE FROM LIABILITY FOR MONETARY DAMAGES

The courts have recognized that in enacting § 1983, it was not the intention of Congress "to abolish wholesale all common law immunities." Pierson v. Ray, 386 U S 547, 554 (1967). Cf. also Tenny v. Brandhove, 341 U S 367 (1951). In Pierson and Tenny, the Supreme Court granted absolute immunity to judges and legislators, for acts done in their official roles or in the discharge of their duties. Similarly, in considering the applicability of the doctrine of governmental immunity in suits brought under § 1983 against officials of government agencies, the courts have consistently held that, at the very least, such officials are entitled to a limited or qualified immunity.

Where governmental officials have been held to be persons suable under § 1983, their liability has been limited to equitable relief, and they have been held immune from liability for monetary damages. Harper v. Kloster, 486 F. 2d 1134 (4th Cir. 1973); Richmond Black Police Officers Assn. v. City of Richmond, 386 F. Supp. 151 (E. D. Va. 1974). In Monti v. Flaherty, 351 F. Supp. 1136 (W. D. Penn. 1972), the Court stated flatly that back wages could not be recovered in an action against public officials under § 1983:

> "A suit for damages maintained against present defendants (mayor and other city officers) is essentially a suit against a political subdivision or municipality and should not be allowed."

See also Kiekow v. Village of Chenequa, 342 F. Supp. 494 (E. D. Wisc. 1972) in which the Court ruled that a suit for damages under § 1983 against the village board of trustees and the village police and commissioners was a suit against a governmental entity and could not stand.

The Supreme Court recently sought to clarify the scope of the immunity of government officials from liability for damages under § 1983. In Wood v. Strickland, 420 U S 308 (1975), an action for damages under § 1983 against school board officials, the Court declared (at p. 318) that "common-law tradition, recognized in our prior decisions, and strong public policy reasons" required the extension of a qualified good faith immunity to the school officials. The Court declared further (at p. 322):

> "A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly

established constitutional rights that his action cannot reasonably be characterized as being in good faith."

It is abundantly plain therefore, that the officials of the Transit Authority named as defendants herein, cannot be held liable for the monetary relief awarded in this proceeding.

CONCLUSION

FOR THE REASONS STATED ABOVE, WE URGE THIS COURT TO GRANT REARGUMENT AND, UPON REARGUMENT VACATE THE ORDER OF JUNE 22, 1977, OR IN THE ALTERNATIVE, MODIFY THE ORDER TO PROVIDE ONLY INJUNCTIVE OR DECLARATORY RELIEF AGAINST THE INDIVIDUALLY NAMED DEFENDANTS. IN THE EVENT REARGUMENT IS DENIED, IT IS URGED THAT THERE BE A REHEARING EN BANC.

August 5, 1977

Respectfully submitted

ALPHONSE E. D'AMBROSE
Attorney for Defendants
370 Jay Street
Brooklyn, New York 11201
(212) 330-4160

HELEN R. CASSIDY
JAMES P. McMAHON
JOAN OFFNER
of Counsel

A P P E N D I X

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1043, 1309—September Term, 1976.

(Argued May 5, 1977 Decided June 22, 1977.)

Docket Nos. 76-7295, 77-7092

CARL A. BEAZER, et al.,

Plaintiffs-Appellees-Cross-Appellants,

v.

NEW YORK CITY TRANSIT AUTHORITY, et al.,

Defendants-Appellants-Cross-Appellees.

Before:

MANSFIELD and OAKES, *Circuit Judges,*
and BRIEANT, *District Judge.**

Appeal from judgment of the United States District Court for the Southern District of New York, Thomas P. Griesa, *Judge*, enjoining as violative of the equal protection and due process clauses of the Fourteenth Amendment the New York City Transit Authority's policy of not hiring participants in methadone maintenance programs; ordering employment and back pay for two individual members of the plaintiff class; and awarding attorneys'

* Of the Southern District of New York, sitting by designation.

fees to appellees. Cross-appeal from denial of relief to three individual members of the class.

Injunction and individual relief affirmed. Award of attorneys' fees modified and, as modified, affirmed. Denial of relief to three individuals reversed, and cause remanded.

ALPHONSE E. D'AMBROSE, Brooklyn, N.Y. (E. W. Summers, G. T. Dunn, of counsel), *for Defendants-Appellants-Cross-Appellees.*

ELIZABETH B. DUBOIS, New York, N.Y., ERIC D. BALBER, MARK C. MORRIL (Michael Meltsner, New York, N.Y., of counsel), *for Plaintiffs-Appellees-Cross-Appellants.*

Brief for the United States as amicus curiae urging affirmance of the appeal filed by Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, Barbara Allen Babcock, Assistant Attorney General, Ronald R. Glancz, Robert S. Greenspan, Walter W. Barnett, Attorneys, Department of Justice, Sidney Edelman, Assistant General Counsel, Robert B. Lanman, Senior Attorney, Department of Health, Education and Welfare, Washington, D. C.

OAKES, *Circuit Judge:*

I.

In a comprehensive and carefully limited opinion, the United States District Court for the Southern District of New York, Thomas P. Griesa, *Judge*, held that the New

York City Transit Authority's blanket exclusion from employment of all persons participating in or having successfully concluded methadone maintenance programs—the plaintiff class in this action brought under 42 U.S.C. § 1983—violated the equal protection and due process clauses of the Fourteenth Amendment. The court enjoined the Transit Authority (TA) from further enforcing its policy. 399 F. Supp. 1032 (S.D.N.Y. 1975). On appeal the TA does not challenge any of Judge Griesa's findings as factually erroneous, nor could it in view of the one-sided record before us. This record, developed over fifteen days of trial, overwhelmingly supports the trial court's findings that, after a brief initial period of adjustment, many former heroin addicts on methadone maintenance are employable and that identification of those who are employable is readily accomplished through regular personnel procedures.

The district court's conclusion of law was that the TA's methadone rule has "no rational relation to the demands of the jobs to be performed." 399 F. Supp. at 1057. This conclusion rests on the solid foundation of *Sugarman* v. *Dougall*, 413 U.S. 634 (1973) (policy against employment of aliens unconstitutionally overinclusive), and our own *Crawford* v. *Cushman*, 531 F.2d 1114, 1123 (2d Cir. 1976) (policy requiring discharge of pregnant Marine unconstitutionally under- and overinclusive), as the United States as amicus curiae points out. *Accord, Cook* v. *Arentzen*, No. 76-1359 (4th Cir. May 6, 1977). The decree is drawn strictly on the basis of the evidence and does not prevent the TA from making regulations to ensure that past or present methadone users are proven to be employable and to prevent their employment in safety-sensitive jobs. Accordingly, we affirm the district court's holding of a constitutional violation and its consequent injunction against further enforcement of the TA policy.

II.

In a supplemental opinion Judge Griesa also held that appellees were entitled to relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., because the TA methadone policy had a racially discriminatory effect. 414 F. Supp. 277 (S.D.N.Y. 1976). Appellees concededly pressed their Title VII claim for the sole purpose of obtaining attorneys' fees under 42 U.S.C. § 2000e-5(k), *see* 414 F. Supp. at 278, and the court did award such fees. We need not reach the Title VII issues in this case, however, because before the decree became final Congress enacted the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988, which permits the court in its discretion to allow a prevailing party in a § 1983 action, as here, "a reasonable attorney's fee as part of the costs." After passage of this statute appellees moved for a declaration that it provided an alternative basis for the award of attorneys' fees in this case, and the district court so ruled. The court awarded to appellees a total fee of $375,000, of which $310,000 was compensation for hours worked, $14,290 was for costs incurred, and the balance was a "premium."

Judge Griesa was correct in holding that the 1976 Act authorized a fee award here, even though it was enacted after most of the services below were rendered. A change in the law is to be given effect in a pending case unless there is some indication to the contrary in the statute or its legislative history or unless manifest injustice would result. *Bradley* v. *School Board*, 416 U.S. 696, 711, 714-16 (1974); *Brown* v. *General Services Administration*, 507 F.2d 1300, 1305-06 (2d Cir. 1974), *aff'd on other grounds*, 425 U.S. 820 (1976). Here, the only reference in the legislative history explicitly supports the Act's application to pending cases, H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 4 n.6 (1976), and no manifest injustice from applying

the statute to this pending case is alleged. Nor is any injustice alleged from the award of fees itself. Since a party who succeeds in enforcing his civil rights should ordinarily recover his attorneys' fees, unless special circumstances—not alleged here—render such recovery unjust, *see* S. Rep. No. 94-1011, 94th Cong., 2d Sess. 4 (1976), *reprinted in* [1976] U.S. Code Cong. & Ad. News 5908, 5912, *quoting Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968); *see also Northcross* v. *Board of Education*, 412 U.S. 427, 428 (1973) (per curiam), the awarding of a fee under the 1976 Act was proper.

In addition to arguing against the awarding of any fee, however, appellants contend that the amount awarded was excessive. With regard to the sums awarded for hours worked and costs incurred, we uphold the district court. The requirements of documentation and an evidentiary hearing as to time charges, set forth in *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 464-74 (2d Cir. 1974), have been fully met here, and our decision in *Torres* v. *Sachs*, 538 F.2d 10 (2d Cir. 1976), permitted the district court to use "the same [fee award] standards as in other complex federal litigation," *id.* at 12, without regard to the nonprofit or "public interest" nature of the legal work done for appellees, *see id.* at 13. As to costs, they are frequently awarded by courts to successful parties, and no challenge is made to appellees' itemization here.

We must modify the district court's award, however, to the extent of eliminating the $50,710 awarded as a "premium." We take the view that this extra award amounted to an abuse of discretion in the particular circumstances of this case. Though complex factual issues were involved, the proof of which required diligent and rather prodigious effort, the legal issues were relatively simple and few. There was no dispute over the governing

constitutional doctrines, although their applicability to the facts was a matter requiring considerable persuasive skill. Moreover, the benefits that the suit will bring to the plaintiff class are not altogether concrete. No monetary fund was recovered for the class (although back pay will be recovered by certain individual claimants); appellants are simply enjoined from continuing past policy. Only members of the class who (1) seek employment with the TA and (2) are not denied employment on legitimate grounds unconnected with methadone use will benefit from this litigation. These two factors, complexity or risk of loss on the legal issues and benefit to the clients, are important considerations in any award of attorneys' fees above an hourly rate. *See City of Detroit* v. *Grinnell Corp., supra,* 495 F.2d at 470; *Alpine Pharmacy, Inc.* v. *Chas. Pfizer & Co.,* 481 F.2d 1045, 1050 (2d Cir.), *cert. denied,* 414 U.S. 1092 (1973); *Blank* v. *Talley Industries, Inc.,* 390 F. Supp. 1, 6 (S.D.N.Y. 1975); *Pealo* v. *Farmers Home Administration,* 412 F. Supp. 561, 567 (D.D.C. 1976). Since neither factor argues in favor of an extra award here, we must heed our own admonition to scrutinize attorneys' fee applications with an "eye to moderation," seeking to avoid either the reality or the appearance of awarding "'windfall fees.'" *City of Detroit* v. *Grinnell Corp., supra,* 495 F.2d at 469, 470. We reduce the award by $50,710 and otherwise affirm it.

III.

Cross-appellants Beazer, Reyes and Wright, three of the named plaintiffs in this class action, were denied individual relief—reinstatement and back pay—by the district court solely on the basis that, by being heroin users while working with the TA before their methadone treatment, they had violated a TA rule prohibiting heroin use. In each case, however, the TA's decision to discharge was

not grounded on any violation of the heroin [illegible], but rather solely on use of methadone. Since this reason was unconstitutional, as above explicated, the court erred in denying individual relief.

The TA's argument against individual relief amounts to an attempt to evade the full force of the district court's holding. The TA first discharged the three employees for one reason and then years later, when that reason was held to be illegal, it sought to avoid any remedy for its wrong by asserting other reasons, never before articulated, why the employees could have been discharged at an earlier time. In the case of such illegal discharges, the wrong done by the employer consists not of discharging the employee but of discharging him for an illegal reason. It is irrelevant to the consideration of a remedy for that wrong that the wrong might have been avoided by a discharge for a legal reason. *Cf. NLRB* v. *George J. Roberts & Sons, Inc.*, 451 F.2d 941, 945 (2d Cir. 1971) (if discharge of employee occurred even partially for motive that violated labor laws, he has suffered a remediable wrong, even if ample valid grounds existed for his discharge); *NLRB* v. *Pembeck Oil Corp.*, 404 F.2d 105, 109 (2d Cir. 1968) (same), *vacated on other grounds*, 395 U.S. 828 (1969). The wrong being proven, the only question remaining is how best to make the discharged employee whole for the violation of his rights. *Cf. Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 763-64 (1976) (remedies under Title VII of 1964 Civil Rights Act for victims of employment discrimination).

Certainly nothing in the record here indicates that the TA at the time of the methadone discharges considered alternatively discharging Beazer, Reyes, and Wright for violation of the heroin use rule. All indications are to the contrary, that the current assertions of the heroin use ground amount to "'counsel's *post hoc* rationalizations,'" *FPC* v. *Texaco, Inc.*, 417 U.S. 380, 397 (1974), *quoting Bur-*

lington Truck Lines, Inc. v. *United States*, 371 U.S. 156, 168 (1962). As for other grounds on which the three individuals might have been discharged—such as Beazer's alleged poor attendance record—these were also not raised until after the district court had held the methadone ground unconstitutional. In any event, the district court examined the records and found these grounds insufficient, and if such a traditional employment problem arises after these three individuals are reinstated, that would provide an independent ground for a new discharge.

The remedies of hiring and back pay were ordered by the district court for two of the individual plaintiffs, and we affirm that holding as consistent with making those plaintiffs whole for the denial of their constitutional rights. We further believe that the same remedies should be ordered for Beazer, Reyes, and Wright, who are in essentially the same position as the other two in having lost or been denied employment for an illegal reason. We accordingly reverse the judgment as to these three plaintiffs and remand to the district court for a determination of the positions to which they should be reinstated and the amount of back pay due to them.

Judgment in accordance with opinion.

480—6-24-77 . USCA—4221
MEILEN PRESS INC., 445 GREENWICH ST., NEW YORK, N. Y. 10013, (212) 966-4177
219

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

CARL A. BEAZER, et al.,
Plaintiffs-Appellees-
Cross-Appellants,

- against -

NEW YORK CITY TRANSIT AUTHORITY, et al.,
Defendants-Appellants-
Cross-Appellees.

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF KINGS)

RICARDO GILL, being duly sworn, deposes and says that he is employed in the office of Alphonse E. D'Ambrose, the attorney for the within named defendants. That on the 9th day of August, 1977, he served the within petition upon Deborah M. Greenberg, Esq., Legal Action Center, the attorney for the within named plaintiffs by depositing 2 true copies of the same securely enclosed in a post-paid wrapper in a Post Office Box regularly maintained by the United States Government at 370 Jay Street, Brooklyn, New York 11201, directed to said attorney for the plaintiffs at No. 271 Madison Avenue, New York, N. Y. 10016, the address within the state designated by her for that purpose upon the preceding papers in this action, or the place where she then kept an office, between which places there then was and now is a regular communication by mail.

Deponent is over the age of 21 years.

Ricardo Gill
RICARDO GILL

Sworn to before me this 9th
day of August, 1977

Albert C. Cosenza

ALBERT C. COSENZA
Notary Public, State of New York
No. (24-0771843)
Qualified in Kings County
Commission Expires March 30, 1979